Azhar bin Lazim v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO C-05–146 OF 2009
HASAN LAH, ABDUL MALIK ISHAK AND SYED AHMAD HELMY JJCA
4 APRIL 2012

Criminal Law — Dangerous Drugs Act 1952 — s 39B — Trafficking — Trafficking of 14,900g cannabis — Appeal against conviction and sentence — Whether appellant's contradictory story of incident credible — Whether there was possession

Evidence — Agent provocateur — Admissibility of evidence — Whether agent provocateur's evidence needed to be corroborated

Acting on information received that a Malay man ('the appellant') would be trafficking drugs using a Felda oil tanker, ASP Detective Sergeant Redzuan Abdullah ('SP6') acted as a drug buyer. On the day of the arrest, SP6 met the appellant at BP Petrol Station and after making enquiries as to the amount and price of the drugs, the appellant showed SP6 a white plastic bag with the word 'Ocean' emblazoned on it. Inside it was a reddish plastic bag containing compressed dried leaves suspected to be cannabis. SP6 then informed the appellant that he would get the money from his car. As planned, SP6 signalled to the raiding party and upon seeing the signal, the raiding party rushed to the scene and arrested the appellant. SP5 retrieved the drugs from the front of the lorry and also arrested the appellant's wife ('SD2'). The drugs were later confirmed to be 3,917g of cannabis through a chemical analysis. The appellant was convicted and sentenced to death for drug trafficking, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). In the present appeal, the appellant gave a different account of what transpired during the incident and this was supported by SD2. He further testified that he was also assaulted by the police.

Held, dismissing the appeal and affirming conviction and sentence:

(1) The High Court was right when it convicted the appellant for trafficking in the dangerous drugs as per charge. The appellant had possession of the dangerous drugs and applying three of the acts of trafficking in s 2 of the DDA, namely selling, transporting or distributing, the appellant was an outright trafficker. There was more than ample evidence adduced by SP5 and SP6 which showed that the appellant had possession and knowledge

of the dangerous drugs in question. The sale of the cannabis was complete even though the price had not been paid (see paras 25 & 49).

(2) The evidence of SP5 and SP6 were credible. There were minor discrepancies and they generally supported one another. Whatever SP6 did, he relayed back the information to SP5 directly. The evidence of an agent provocateur needed no corroboration to found a finding by the court. The evidence of SP6, standing alone, was sufficient to prove by way of direct evidence that the appellant was trafficking in 3,917g of cannabis. When SP5's evidence was taken into account, it added mileage to the prosecution's case (see paras 30 & 46–47).

(3) The appellant testified that he was assaulted by the police at the time of the arrest yet he did not lodge a police report or complain to the magistrate when he was remanded. In fact, the allegation of being assaulted was not put across to the prosecution witnesses and it was raised for the first time in his defence. The whole purpose of the defence having to put its case to the prosecution was for the prosecution to check on whether the appellant's version of the facts were true or false. It was also for the purpose of avoiding an adverse comment by the prosecution that such a defence was a recent invention. Such failure of the defence to put its case across could never, standing by itself, relieve the prosecution of its duty of establishing the charge, beyond any reasonable doubt (see para 29).

(4) The drugs tendered in court were the ones that were seized from the appellant. All the exhibits were marked and there was no break in the chain of evidence. There was no requirement that each and every officer who handled the exhibits must be called (see para 32).

[Bahasa Malaysia summary

Bertindak atas maklumat yang diterima bahawa lelaki Melayu ('perayu') akan mengedar dadah dengan menggunakan tangki minyak Felda, ASP Sarjan Detektif Redzuan Abdullah ('SP6') bertindak sebagai pembeli dadah. Pada hari penangkapan, SP6 bertemu dengan perayu di Stesyen Minyak BP dan selepas membuat pertanyaan terhadap jumlah dan harga dadah, perayu menunjukkan SP6 beg plastik putih dengan perkataan 'Ocean' tertera di atasnya. Di dalamnya terdapat beg plastic kemerah-merahan mengandungi daun-daun kering yang dimampat yang disyaki adalah kanabis. SP6 kemudiannya memberitahu perayu bahawa dia akan mendapatkan wang daripada keretanya. Seperti yang dirancangkan, SP6 memberi isyarat kepada anggota serbuan dan selepas melihat isyarat, anggota serbuan menyerbu ke tempat kejadian dan menangkap perayu. SP5 merampas dadah tersebut daripada bahagian depan lori dan juga menangkap isteri perayu ('SD2'). Dadah tersebut kemudiannya disahkan kanabis seberat 3,917g melalui analisa kimia. Perayu disabitkan dan dihukum mati kerana mengedar dadah, kesalahan di bawah s 39B(1)(a) Akta

A Dadah Berbahaya 1952 ('ADB'). Dalam rayuan ini, perayu memberi versi berbeza mengenai apa yang berlaku semasa kejadian dan ini disokong oleh SD2. Dia kemudiannya memberi keterangan bahawa dia diserang oleh polis.

B **Diputuskan**, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Mahkamah Tinggi adalah betul apabila ia menyabit perayu kerana mengedar dadah berbahaya seperti tuduhan. Perayu mempunyai milikan dadah berbahaya dan menggunapakai tiga daripada tindakan-tindakan mengedar di dalam s s 2(a) ADB, iaitu menjual, mengangkut atau
C mengagih, perayu adalah benar-benar pengedar. Terdapat keterangan yang lebih mencukupi yang dikemukakan oleh SP5 dan SP6 yang menunjukkan bahawa perayu mempunyai milikan dan pengetahuan mengenai dadah berbahaya tersebut. Jualan kanabis selesai walaupun harganya tidak dibayar (lihat perenggan 25 & 49).

D

(2) Keterangan SP5 dan SP6 adalah boleh dipercayai. Terdapat sedikit percanggahan dan mereka pada biasanya menyokong satu sama lain. Apa-apa yang dilakukan oleh SP6, dia memberitahu maklumat tersebut secara terus kepada SP5. Keterangan ejen perangkap tidak memerlukan
E sokong untuk mendapatkan dapatan oleh mahkamah. Keterangan SP6, dengan sendirinya mencukupi untuk membuktikan melalui keterangan terus bahawa perayu mengedar 3,917g kanabis. Apabila keterangan SP5 diambil kira, ia menambahkan kekukuhan kepada kes pihak pendakwaan (lihat perenggan 30 & 46–47).

F

(3) Perayu memberi keterangan bahawa dia diserang oleh polis pada masa ditangkap tetapi dia tidak membuat laporan polis atau aduan kepada majistret apabila dia ditahan. Sebenarnya, dakwaan diserang tidak disoal kepada saksi-saksi pihak pendakwaan dan ia dibangkitkan untuk
G pertama kali di dalam pembelaannya. Tujuan keseluruhan pembelaan dengan menyampaikan pembelaannya kepada pihak pendakwaan adalah untuk pihak pendakwaan memeriksa sama ada versi fakta perayu adalah betul atau salah. Ia juga untuk tujuan mengelak ulasan bertentangan oleh pihak pendakwaan bahawa pembelaan sedemikian adalah rekaan
H terbaharu. Kegagalan pembelaan sedemikian untuk membela kesnya tidak boleh, berdiri dengan sendirinya, membebaskan pihak pendakwaan daripada tugasnya untuk membuktikan tuduhan, melampaui apa-apa keraguan munasabah (lihat perenggan 29).

I (4) Dadah yang ditender di mahkamah adalah dadah yang dirampas daripada perayu. Kesemua ekshibit ditanda dan tidak terdapat kelompangan di dalam rantai keterangan. Tidak terdapat keperluan bahawa setiap pegawai yang menguruskan ekshibit-ekshibit mesti dipanggil (lihat perenggan 32).]

Notes

For cases on s 39B, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 378–430.

Cases referred to

AEG Carapiet v AY Derderian AIR [1961] Calcutta 359 (refd)
Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen and another appeal [1995] 2 MLJ 770; [1995] 3 CLJ 639, CA (refd)
Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209; [1996] 1 CLJ 705, FC (refd)
Amathevelli a/p Ramasamy v PP [2009] 2 MLJ 367; [2009] 3 CLJ 109, FC (refd)
Arumugam Periasamy v PP [2005] 3 MLJ 685; [2005] 3 CLJ 685, CA (refd)
Chandrasekaran & Ors v PP [1971] 1 MLJ 153 (refd)
Chean Siong Guat v PP [1969] 2 MLJ 63 (refd)
Chua Beow Huat v PP [1970] 2 MLJ 29 (refd)
Francis Antonysamy v PP [2005] 3 MLJ 389; [2005] 2 AMR 750; [2005] 2 CLJ 481, FC (refd)
Gade Lakshmi Mangraju alias Ramesh v State of Andhra Pradesh AIR 2001 SC 2677 (refd)
Gunalan a/l Ramachandran & Ors v PP [2004] 4 MLJ 489; [2004] 6 AMR 189,; [2004] 4 CLJ 551, CA (refd)
Krishna Rao a/l Gurumurthi v PP and another appeal [2009] 3 MLJ 643; [2009] 2 CLJ 603, FC (refd)
Mat v PP [1963] MLJ 263 (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (refd)
Mohamad Yazri bin Minhat v PP [2003] 2 MLJ 241; [2003] 2 AMR 404, CA (refd)
Mohamed Alias v PP [1983] 2 MLJ 172 (refd)
Pendakwa Raya lwn Roya Boola [2003] 6 AMR 192, HC (refd)
PP v Badrulsham bin Baharom [1988] 2 MLJ 585 (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705; [2000] 4 CLJ 649, HC (refd)
PP v Datuk Hj Harun bin Hj Idris (No 2) [1977] 1 MLJ 15 (refd)
PP v Hairul Din bin Zainal Abidin [2001] 6 MLJ 146, HC (refd)
PP v Kanapathy a/l Kupusamy & Anor [2001] 5 MLJ 20, HC (refd)
PP v Kang Ho Soh [1992] 1 MLJ 360, HC (refd)
PP v Lim Hock Boon [2009] 3 MLJ 604; [2009] 2 AMR 768, FC (refd)
PP v Lin Lian Chen [1992] 2 MLJ 561, SC (refd)
PP v Mohamed Ali [1962] MLJ 257 (refd)
PP v Mohamed Noor bin Jantan [1979] 2 MLJ 289, FC (refd)
PP v Mohd Farid bin Mohd Sukis & Anor [2002] 3 MLJ 401; [2002] 3 AMR 3457, HC (refd)
PP v Mohamed Halipah [1982] 1 MLJ 155 (refd)
PP v Nik Ahmad Aman bin Nik Mansor [2002] 5 MLJ 641; [2002] 2 AMR 2515, HC (refd)

PP v Reza Mohd Shah bin Ahmad Shah [2002] 4 MLJ 13, HC (refd)
PP v Sa'ari Jusoh [2007] 2 MLJ 409; [2007] 2 CLJ 197, FC (refd)
Pulukuri Kottaya and others v Emperor AIR 1947 PC 67, PC (refd)
Sandra Margaret Birch v PP [1978] 1 MLJ 72 (refd)
Su Ah Ping v PP [1980] 1 MLJ 75, FC (refd)
Tan Kim Ho & Anor v PP [2009] 3 MLJ 151; [2009] 3 CLJ 236, FC (refd)
Tee Thian See v Pendakwa Raya [1996] 3 MLJ 209, HC (refd)
Wai Chan Leong v PP [1989] 3 MLJ 356, SC (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)
Y Jeyamuraly a/l Yesiah v PP [2007] 5 MLJ 224; [2007] 5 CLJ 605, CA (refd)
Yee Ya Mang v PP [1972] 1 MLJ 120 (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 37(d), 37A, 37A(1)(b), 39B(1)(a), 39B(2), 40A(1)
Evidence Act 1950 s 27

Appeal from: Criminal Trial No 45–01 of 2006High Court, Temerloh)

Ramzani bin Idrus (Faiz Fadzil and Mohd Aini Zaini with him) (Haresh Mahadevan & Co) for the appellant.
Aslinda bt Ahad (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abdul Malik Ishak JCA (delivering judgment of the court):

INTRODUCTION

[1] The appellant was charged for trafficking in dangerous drugs, to wit, 3,917g of cannabis, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') and punishable under s 39B(2) of the DDA. The charge against the appellant was worded in this way:

> Bahawa kamu pada 18hb Februari 2005 jam lebih kurang 9.30 malam di kawasan Parking Pam Minyak BP, Jalan Tras, di dalam Daerah Raub, Negeri Pahang Darul Makmur, telah didapati mengedar dadah berbahaya iaitu 5 ketulan mampat daun kering mengandungi 3,917 gram cannabis tanpa kebenaran yang sah di sisi undang-undang, oleh itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta Dadah Berbahaya 1952.

[2] The appellant claimed trial and the prosecution called seven witnesses. At the close of the prosecution's case, the High Court found that a prima facie case was established and called the appellant to enter his defence. The appellant gave his evidence under oath and he too called his wife Norhayati bt Zakaria ('SD2')

as his witness. At the end of the defence case, the High Court found the appellant guilty of the charge and sentenced him to death. Aggrieved, the appellant now appeals to this court.

THE PROSECUTION'S CASE

[3] On 18 February 2005, the chief narcotics division of the Bentong police station by the name of ASP Roslee bin Jusoh ('SP5') received an information that a Malay man would be trafficking in drugs using a Felda oil tanker lorry at the BP petrol station, at Jalan Tras, Raub, Pahang ('BP petrol station'). SP5 then assigned Detective Sergeant Redzuan Abdullah ('SP6') to act as an agent provocateur by impersonating as a buyer to purchase the drugs.

[4] SP5 assembled his police personnel together with SP6 and briefed them pertaining to the operation of laying an ambush and to arrest the suspect. SP6 was detailed to approach the suspect under the guise of purchasing the drugs. When SP6 has been shown the drugs by the suspect, SP6 would light a cigarette as a signal to the raiding party to swing into action and to effect the arrest on the suspect.

[5] On 18 February 2005, at about 8.30pm, SP5 and his police party arrived at the BP petrol station and took up ambush positions. At about 9pm, SP6 was seen alone driving a motorcar and entering the BP petrol station area and waited for the suspect. At about 9.20pm, a Felda oil tanker lorry was seen entering the BP petrol station area and stopped at the designated parking bay. SP6 then drove his motor car forward towards the parked Felda oil tanker lorry from the rear. SP6 alighted from his motorcar and met the driver of the Felda oil tanker lorry at the rear of the said lorry. SP6 was seen talking and discussing with the driver (identified as the appellant) and that Felda oil tanker lorry can be seen at photograph marked as exh 'P5'.

[6] SP6 asked the appellant 'mana ganja?'. The appellant replied, 'ada'. SP6 then enquired 'berapa?', and the appellant replied '5 kilo'. The appellant was then seen entering the front part of the said lorry and came down carrying a white plastic bag (exh 'P3A') with the word 'Ocean' written on it and showed it to SP6. The appellant opened the white plastic bag and SP6 saw inside it a reddish plastic containing five compressed dried leaves suspected to be cannabis. Having satisfied himself that the appellant was carrying the drugs, SP6 then told the appellant that he would take the money from his motorcar and SP6 then walked away from the appellant. At this juncture, SP6 gave the pre-planned signal by lighting his cigarrete for the police party to swing into action.

[7] On seeing the signal, SP5 and his police party rushed towards the

appellant who by this time had walked towards the front part of the said lorry. On reaching the appellant, SP5 identified himself and arrested the appellant. Thereafter SP5 frantically searched for any incriminating articles outside and inside the Felda oil tanker lorry but to no avail. SP5 then read the caution under s 37A(1)(b) of the DDA to the appellant and SP5 then asked the appellant 'ada bawa apa-apa barang?'. The appellant replied 'ada bawa ganja 5 k'. SP5 then asked the appellant 'di mana kamu sembunyi?', and the appellant replied 'saya sembunyi dalam rumput depan lori'. The appellant then indicated to SP5 the direction where the drugs were hidden by puckering his lips. SP5 followed the direction and together with the appellant SP5 found a white plastic bag (exh 'P3A') on the grass in front of the said lorry with the word 'Ocean' written on it and after SP5 examined it, in the presence of the appellant, SP5 found inside it another reddish plastic bag (exh 'P3B') containing five compressed dried leaves suspected to be cannabis (exhs 'P10', 'P12', 'P14', 'P16' and 'P18').

[8] SP5 also placed under arrest a Malay lady who sat at the passenger's side of the Felda oil tanker lorry and she was identified as the wife of the appellant who gave evidence in court as the appellant's witness (SD2).

[9] The exhibits together with the appellant and SD2 were then taken to Ibu Pejabat Daerah (IPD) Raub where SP5 lodged a police report vide Raub Report No 351/2005. A search list (exh 'P19') was also prepared and the exhibits were also marked accordingly. Photographs were also taken.

[10] In due course, the government chemist analysed and confirmed that the five compressed dried leaves were cannabis, a dangerous drug under the DDA, weighing 3,917g.

THE DEFENCE CASE

[11] The learned High Court judge was correct when his Lordship remarked that the appellant 'gave a totally contradictory story of the whole incident'. His Lordship then reproduced verbatim the defence of the appellant and we are constrained to do so likewise. The appellant gave his evidence in the Malay language and it was in this fashion as seen at pp 117–118 of the appeal record (evidence by way of an examination-in-chief):

> Masa itu 1 kereta datang parking di belakang lori saya. Kemudian turun seorang lelaki Cina, dia menghampiri saya memanggil saya 'brother', 'brother'. Saya bangun dan tanya 'kenapa'. Dia tanya 'ada barang itu'? Saya tanya 'barang apa'. Dia kata ganja. Saya kata saya tak ada barang itu. Saya kata 'awak salah orang'. Dia kata 'tak mungkin salah orang'. Saya kata 'saya tak kenal awak'. Kemudian ia keluar seikat duit. Dia tunjuk kepada saya sambil kata 'kalau tak percaya ini duit'. Saya kata 'minta maaf, saya tidak tahu apa-apa, saya tidak ada barang itu'.

[12] Continuing at pp 118–120 of the appeal record, the appellant testified in examination-in-chief in this way:

> Masa itu datang seorang lelaki dari arah lori kecil. Dia panggil saya 'Bang'. Dia menghampiri saya. Bila dia dekat ia peluk saya dari belakang dan tarik tangan saya ke belakang dan terus digari. Saya bertanya 'kenapa ni', 'apa hal'. Dia tak jawab apa-apa. Saya perhatikan di hadapan lori ada 3-4 orang datang juga dari arah belakang. Mereka membawa saya ke depan lori. Salah seorang soal saya 'mana barang itu', saya kata saya tak tahu barang apa. Lepas itu salah seorang memukul perut saya. Kemudian diikuti pukul di muka dan perut sehingga saya terduduk melutut. Kemudian salah seorang membangunkan saya dan salah seorang pegang dagu saya, kemudian menampar muka saya. Ia memberi amaran 'dengar sini', apa-apa percakapan daripada awak akan menjadi bukti'. Sekali lagi saya ditampar. Dia tanya 'mana barang itu'. Saya jawab 'tak tahu', tolonglah saya tak tahu apa-apa'. Kemudian saya dipukul di perut saya terduduk lagi melutut diikuti dengan beberapa pukulan hingga saya rebah. Masa itu saya dengar rungutan 'Oo kau degil lagi'. Terus saya disepak di perut. Oleh kerana saya tak tahan saya menjerit dan saya berkata, 'Ok-Ok nanti dulu'. Saya dibangunkan semula. Salah seorang kata 'ha … kan senang'. Kemudian saya dipapah ke kelapa sawit di hadapan lori. Kemudian saya didudukkan secara melutut. Di depan saya terdapat 1 beg plastik berwarna putih.

[13] In his defence, the appellant testified that he was approached, while he was standing behind the Felda oil tanker lorry which was parked at the BP petrol station, by a male Chinese who initially asked about the 'barang' and when asked what was the 'barang' by the appellant, that male Chinese was referring to 'ganja'. The appellant retorted that he did not have that 'barang' and that the male Chinese might be referring to someone else. But the male Chinese insisted that the appellant was the right person. Again, the appellant denied and at this point of time, the male Chinese produced some money and showed it to the appellant. The appellant apologised and told the male Chinese that he did not have that 'barang'.

[14] The appellant further testified that he was assaulted by the police personnel at the scene of the crime that caused him to show the location of the drugs. This allegation by the appellant that he was assaulted by the police personnel when he was arrested that caused him to show the location of the drugs within the grass near to the front of the Felda oil tanker lorry which was parked at the BP petrol station was raised for the very first time in his defence.

[15] SD2 — the appellant's wife, testified along the following lines. That she accompanied the appellant in the Felda oil tanker lorry from Port Klang to Raub and there they stopped at the BP petrol station. She alighted from the Felda oil tanker lorry to ease herself at the toilet. She testified that she went to the toilet between five to six minutes and when she returned, the appellant was

still seated behind the steering wheel of the Felda oil tanker lorry. As soon as she re-entered the said lorry, the appellant alighted. She remained seated in the Felda oil tanker lorry.

[16] According to SD2, she witnessed her husband being arrested outside the Felda oil tanker lorry more to the front. There were about five to six people that raided the said lorry. After the appellant was arrested, she was asked to alight from the said lorry by the police. She complied and she was taken to a motorcar which was quite a distance away from the said lorry.

[17] According to SD2, she was not sure as to what had transpired between the police and her husband — the appellant.

[18] According to SD2, the police told her that her husband was arrested for trafficking drugs. She said that she did not see her husband carrying any package from Port Klang.

[19] Under cross-examination, she testified that she would not know whether her husband alighted from the said lorry when she was in the toilet.

ANALYSIS

[20] Independent of any presumption, this is a case where sufficient evidence was led by the prosecution wherein a strong inference may be drawn that the appellant had knowledge of the drugs and that it was in his exclusive physical possession. From the evidence adduced, an irresistible inference may be inferred that the appellant was aware of his possession and that he knew the nature of the drug which he possessed and he too had the necessary power of disposal over it. To put it succinctly, the appellant had mens rea possession.

[21] It is essentially a question of law as to what constitutes possession. And whether the appellant was in possession of the drug, is purely a question of fact (*Pendakwa Raya v Kang Ho Soh* [1992] 1 MLJ 360, at p 371). The facts must be scrutinised and analysed in order to establish possession. Knowledge is one of the essential ingredients of possession. It reflects the mental element (*Public Prosecutor v Badrulsham bin Baharom* [1988] 2 MLJ 585). According to Sharma J in *Yee Ya Mang v Public Prosecutor* [1972] 1 MLJ 120, the word 'possession' is defined in this way:

> The word 'possession' implies a physical capacity to deal with the thing as one likes to the exclusion of everyone and a determination to exercise that physical power on one's own behalf. It implies dominion and consciousness in the mind of the person having 'possession' that he not only has such dominion but also that he can exercise it.

[22] The prosecution can easily prove possession in two ways. By direct or circumstantial evidence. Under the DDA, possession can also be proven by invoking the statutory presumption under s 37(d) provided custody or control of anything whatsoever containing any dangerous drug is proven. But in the context of the present appeal, the High Court found that there was no necessity to resort to the presumption of possession under the DDA. This was what the High Court said at p 20 of the appeal record:

> Looking in totality the evidence of SP5 and SP6 there is ample direct evidence to show that the accused had complete and exclusive possession of the drugs found. This is a case where the prosecution need not resort to the presumption of possession available under the DDA.

[23] The evidence of the two prosecution witnessess — SP5 and SP6, established beyond reasonable doubt that the appellant had possession of the dangerous drugs in question. At pp 14–15 of the appeal record, this was what the High Court said:

> It was SP5's evidence that he saw SP6 talking with the accused and the accused then going to the front of the tanker and bringing back a white plastic which he identified as the plastic bearing the words 'Ocean' which was recovered later at the front of the tanker. Further after the accused was arrested and when questioned by SP5 admitted having the drugs with him and then showed SP5 where the plastic bag containing the drugs was.

[24] Now, according to SP6, he approached the appellant and inquired as to whether the appellant had the drugs. The appellant answered 'yes'. A short while later, the appellant showed a white plastic bag to SP6 with the writing 'Ocean' on it. According to SP6, the appellant opened the white plastic bag and showed its contents suspected to be drugs to SP6. After seeing the contents and on the pretext of taking the money at his motorcar in order to effect payment, SP6 proceeded towards his motorcar and at the same time lighted a cigarette as a signal for the police party to ambush the appellant.

[25] In our judgment, the High Court was right when it convicted the appellant for trafficking in the dangerous drugs as per the charge. There was more than ample evidence adduced by the prosecution witnesses SP5 and SP6 which showed that the appellant had possession and knowledge of the dangerous drugs in question and that the burden was on the appellant to create a reasonable doubt in the prosecution's case (*Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169 (SC); and *Mat v Public Prosecutor* [1963] MLJ 263).

[26] The appellant, in his defence, denied that he was in possession of ganja (cannabis) that was found on the grass in front of the Felda oil tanker lorry. The

appellant testified that he stopped at the BP petrol station because his wife wanted to use the toilet and not because he wanted to transact the sale of the drugs. The appellant also denied that at the time of his arrest he was not in the process of handing over the drugs to SP6 but rather he was examining the said lorry.

[27] A credible defence is a defence that answers the evidence of the prosecution. It is purely a question of fact whether the explanation of the defence is capable of raising a reasonable doubt. All too often, and the present appeal is not an exception, the accused is condemned by his own conduct (*Public Prosecutor v Reza Mohd Shah bin Ahmad Shah* [2002] 4 MLJ 13; *Krishna Rao Gurumurthi v Public Prosecutor and another appeal* [2009] 3 MLJ 643; [2009] 2 CLJ 603 (FC); *Amathevelli P Ramasamy v Public Prosecutor* [2009] 2 MLJ 367; [2009] 3 CLJ 109 (FC); and *Pendakwa Raya v Lim Hock Boon* [2009] 3 MLJ 604; [2009] 2 AMR 768 (FC)). It is necessary for the accused to explain his conduct.

[28] In *Amathevelli P Ramasamy v Public Prosecutor*, the conviction of the appellant was affirmed by the Federal Court on the sole ground of her subsequent conduct which consisted of the following acts:

(a) bringing the police team to her house;

(b) using the key attached to the chain that she was wearing to open the cupboard;

(c) taking out a folded green blouse from the cupboard; and

(d) taking out from the blouse a folded handkerchief containing exhs 'P40' and 'P44 A–F' which belonged to the deceased.

[29] The appellant testified that he was assaulted by the police at the time of his arrest, yet he did not lodge a police report or complain to the magistrate when he was remanded. In actual fact the allegation of being assaulted was not put across to the prosecution witnesses and it was raised for the first time in his defence (*Tan Kim Ho & Anor v Public Prosecutor* [2009] 3 MLJ 151; [2009] 3 CLJ 236 (FC); *Aik Ming (M) Sdn Bhd & 8 Ors v Chang Ching Chuen & Another appeal* [1995] 2 MLJ 770; [1995] 3 CLJ 639 (CA); *Chua Beow Huat v Public Prosecutor* [1970] 2 MLJ 29; *AEG Carapiet v AY Derderian* AIR 1961 Calcutta 359; *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 (FC); and *Public Prosecutor v Lin Lian Chen* [1992] 2 MLJ 561 (SC)). The whole purpose of the defence having to put its case to the prosecution witnesses is for the prosecution to check on whether the appellant's version of the facts is true or false. It is also for the purpose of avoiding an adverse comment by the prosecution, like the present appeal at hand, that such a defence is a recent invention. But such failure on the part of the defence to put its case across can never, standing by

itself, relieve the prosecution of its duty of establishing the charge of trafficking in the dangerous drugs, to wit, 3,917g of cannabis as per the charge beyond any reasonable doubt (*Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209; [1996] 1 CLJ 705 (FC)).

[30] Seen in its correct perspective, the evidence of SP5 and SP6 are credible. There were minor discrepancies in their evidence. But generally they support one another and it was in the nature of a direct evidence showing that the appellant had exclusive possession and was trafficking in the dangerous drugs in question.

[31] As police officers both SP5 and SP6 were carrying out their duties in accordance with the law and there was no reason for them to lie. In *Public Prosecutor v Mohamed Ali* [1962] MLJ 257, Thomson CJ had this to say about the evidence of a police witness (see p 258 of the report):

> When a police witness says something that is not inherently improbable his evidence must in the first instance be accepted.

[32] Continuing at the same page, this was what His Lordship said:

> in the absence of contradiction, however, and in the absence of any element of inherent improbability the evidence of any witness, whether a Police witness or not, who gives evidence on affirmation, should normally be accepted.

[33] In *Chean Siong Guat v Public Prosecutor* [1969] 2 MLJ 63, Abdul Hamid Omar J (later the Lord President of the Supreme Court), had this to say about discrepancies:

> Discrepancies may, in my view, be found in any case for the simple reason that no two persons can describe the same thing in exactly the same way. Sometimes what may appear to be discrepancies are in reality different ways of describing the same thing, or it may happen that the witnesses who are describing the same thing might have seen it in different ways and at different times and that is how discrepancies are likely to arise.

[34] Charles Ho J, in *Mohamed Alias v Public Prosecutor* [1983] 2 MLJ 172, at p 173, considered discrepancies in this way:

> In considering the discrepancies the court should take into account the educational background and experience of the witness and whether the witness is describing events which have taken place recently or a long time ago and the demeanour.

[35] Raja Azlan Shah FJ (as His Majesty then was) in *Public Prosecutor v Datuk Hj Harun bin Hj Idris (No 2)* [1977] 1 MLJ 15, at p 19 aptly said:

A In my opinion discrepancies there will always be, because in the circumstances in which the events happened, every witness does not remember the same thing and he does not remember accurately every single thing that happened.

B **[36]** And continuing at the same page, His Majesty had this to say:

I shall be almost inclined to think that if there are no discrepancies, it might be suggested that they have concocted their accounts of what had happened or what had been said because their versions are too consistent. The question is whether the existence of certain discrepancies is sufficient to destroy their credibility. There is no C rule of law that the testimony of a witness must either be believed in its entirety or not at all. A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other. It is, therefore, necessary to scrutinise each evidence very carefully as this involves the question of weight to be given to certain evidence in particular circumstances.

D **[37]** In the present appeal, the High Court preferred the evidence of SP5 and SP6 as opposed to the evidence of the appellant. At p 18 of the appeal record, this was what the High Court said:

E Besides that in comparing the evidence of SP5 and SP6 against that of the accused I chose to believe the evidence of the prosecution witnesses as their evidence was spontaneous and consistent as compared (to) the accused, who was hesitant in answering certain questions.

F **[38]** Now, the information by the appellant to SP5 was clear. It led to the recovery of the drugs on the grass in front of the said lorry. Section 27 of the Evidence Act 1950 enacts as follows:

G When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of that information, whether the information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

H **[39]** The rationale of s 27 of the Evidence Act 1950 is quite simple. If the information by the accused is supported by the discovery of a certain fact, that information may be presumed to be true and that information cannot be construed to have been extracted. According to Sir John Beaumont in the Privy Council case of *Pulukuri Kottaya and others v Emperor* AIR 1947 PC 67, at p 70:

I Section 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that discovery of a fact in consequence of information

> received from a person accused of any offence in the custody of a Police officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate.

[40] In regard to the information under s 27 of the Evidence Act 1950, the High Court at pp 19–20 of the appeal record had this to say:

> The accused had also in this case gave information leading to the discovery of the drugs which shows that he had full knowledge of the drugs as well as control over them.
>
> As to the manner as to how to evaluate the information leading to discovery I referred to the case of *Krishna Rao Gurunathi v Public Prosecutor* [2009] 2 CLJ 603:
>
> > It should be borne in mind that the hurdles to overcome for the admission of cautioned statement and for discovery statement are quite distinct The former demands voluntariness at the time of making it and that there should be absence of any form of oppression, inducement, threat or promise to the maker. The latter does not require those prerequisites save that the court has the discretion to exclude it on the ground that its prejudicial effect outweighed its probative value (see *Goi Ching Ang v Public Prosecutor* [1999] 1 CLJ 829; *Kesavan Petchayo v Public Prosecutor* [2003] 1 CLJ 846).
>
> In the case before me the probative value of the information leading to discover far outweighed its prejudicial value.

[41] When asked as to the whereabouts of the drugs, the appellant indicated to SP5 the direction where the drugs were hidden by puckering his lips. And following the appellant's direction, SP5 found the drugs in a white plastic bag on the grass in front of the said lorry. That would constitute an act of pointing in response to a question and such action is a statement under s 37A of the DDA (*Y Jeyamuraly a/l Yesiah v Public Prosecutor* [2007] 5 MLJ 224; [2007] 5 CLJ 605 (CA)). And in order to render it admissible under s 37A of the DDA, the prosecution must prove that it was voluntarily given by the appellant and that can only be achieved by conducting a trial within a trial. Here, there was no trial within a trial because the High Court held the views that learned defence counsel failed to challenge the admission initially and only challenged it later and the High Court refused to allow the objection as His Lordship felt that it was an afterthought and baseless. The High Court also cited and relied on the case of *Public Prosecutor v Mohamed Noor bin Jantan* [1979] 2 MLJ 289 where

Suffian LP remarked that 'if, on the other hand, the defence does not challenge the voluntary nature of the statement, there is no reason whatsoever for holding a trial within a trial'.

[42] Be that as it may, it cannot be denied that the information supplied by the appellant led to the discovery of the drugs. And that information too relate distinctly to the discovery of the drugs as per the charge (*Wai Chan Leong v Public Prosecutor* [1989] 3 MLJ 356 (SC); *Yee Ya Mang v Public Prosecutor*; and *Sandra Margaret Birch v Public Prosecutor* [1978] 1 MLJ 72).

[43] Raja Azlan Shah FJ (as His Majestry then was) in *Chandrasekaran & Ors v Public Prosecutor* [1971] 1 MLJ 153, at p 158, observed that s 27 is a concession to the prosecution and the information given thereunder is admissible because the discovery of the relevant fact 'provides the acid test, the truth of the statement that led to the discovery is thereby guaranteed'.

[44] Nik Hashim bin Nik Abdul Rahman J (later FCJ) in *Public Prosecutor v Kanapathy a/l Kupusamy & Anor* [2001] 5 MLJ 20, at p 28 aptly said:

> To constitute 'information' under the section, the information must come from the accused and nobody else.

[45] Finally, the Federal Court in *Francis Antonysamy v Public Prosecutor* [2005] 3 MLJ 389; [2005] 2 AMR 750; [2005] 2 CLJ 481, categorically held that the admissibility of s 27 information is not subject to nor is it dependent upon the voluntary character of the information. That being the case, it is our judgment that the information supplied by the appellant that led to the discovery of the drugs as per the charge must be held to be admissible under s 27 of the Evidence Act 1950.

[46] It must also be borne in mind that there is the evidence of SP6 — an agent provocateur. Whatever SP6 did, he relayed back the information to SP5 directly. Section 40A(1) of the DDA states that no agent provocateur shall be presumed to be unworthy of credit by reason only of his having attempted to abet or abetted the commission of an offence if the attempt to abet or abetment was for the sole purpose of securing evidence against such person. According to Yusuf Abdul Rashid J in *Public Prosecutor v Mohamed Halipah* [1982] 1 MLJ 155, the evidence of an agent provocateur need no corroboration to found a finding by the court. K C Vohrah J (later JCA) in *Tee Thian See v Pendakwa Raya* [1996] 3 MLJ 209, at p 217 said that the evidence of an agent provocateur is not that of an accomplice and does not require corroboration.

[47] In our judgment, the evidence of SP6, standing alone, is sufficient to

prove by way of direct evidence that the appellant was trafficking in cannabis, to wit, 3,917g. And when the evidence of SP5 is taken into account it adds mileage to the prosecution's case.

[48] There are eighteen different acts stipulated in s 2 of the DDA that constitute the offence of trafficking. And before the 'trafficking' definition of s 2 of the DDA can be invoked, the prosecution must prove possession of the dangerous drugs by the appellant. Here, the High Court rightly held that the appellant had exclusive possession of the cannabis in question. In short, the appellant cannot be said to sell, transport or distribute the dangerous drugs within the meaning of the word 'trafficking' in s 2 of the DDA unless the appellant was in possession of the dangerous drugs. In our judgment, it is sufficient to prove one of the acts in s 2 of the DDA to make out a case of trafficking against the appellant (*Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705; [2000] 4 CLJ 649; *Mohamad Yazri bin Minhat v Public Prosecutor* [2003] 2 MLJ 241; [2003] 2 AMR 404 (CA); *Public Prosecutor v Mohd Farid bin Mohd Sukis & Anor* [2002] 3 MLJ 401; [2002] 3 AMR 3457; *Arumugam Periasamy v Public Prosecutor* [2005] 3 MLJ 685; [2005] 3 CLJ 685 (CA); *Public Prosecutor v Hairul Din bin Zainal Abidin* [2001] 6 MLJ 146; and *Pendakwa Raya v Nik Ahmad Aman bin Nik Mansor* [2002] 5 MLJ 641; [2002] 2 AMR 2515).

[49] In our judgment, the appellant had possession of the dangerous drugs, to wit, cannabis and applying three of the acts of trafficking in s 2 of the DDA, namely, selling, transporting or distributing the appellant was an outright trafficker thereby committing an offence as per the charge (see the decision of Nik Hashim bin Nik Abdul Rahman JCA (later FCJ) in *Pendakwa Raya lwn Roya Boola* [2003] 6 AMR 192).

[50] The absence of the appellant's fingerprints on the exhibits are not fatal to the prosecution's case. It must be emphasised that the evidence of SP5 and SP6 clearly point to the guilt of the appellant. From the evidence of SP5 and SP6, the prosecution succeeded in establishing that:

(a) the appellant had custody and control of the dangerous drugs;

(b) the appellant had possession of the dangerous drugs which is the core element of trafficking; and

(c) the appellant trafficked in the dangerous drugs as per the charge.

[51] KT Thomas J in *Gade Lakshmi Mangraju alias Ramesh v State of Andhra Pradesh* AIR 2001 SC 2677, at p 2681, aptly said:

A Presence of a fingerprint at the scene of occurrence is a positive evidence but the absence of a fingerprint is not enough to foreclose the presence of the persons concerned at the scene. If during perpetration of the crime the fingerprint of the culprit could possibly be remitted at the scene it is equally a possibility that such a remnant would not be remitted at all. Hence absence of finger impression is not guarantee of absence of the person concerned at the scene.

B

[52] In regard to the allegation that there were breaks in the chain of evidence pertaining to the subject matter of the charge, we are satisfied that the drugs tendered in court were the ones that were seized from the appellant. All the
C exhibits were marked and there was no break in the chain of evidence. There is no legal requirement that each and every officer who had handled the exhibits must be called (*Su Ah Ping v Public Prosecutor* [1980] 1 MLJ 75 (FC), per Suffian LP; and *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489; [2004] 6 AMR 189 ; [2004] 4 CLJ 551 (CA), per Abdul Hamid bin
D Mohamad JCA (later Chief Justice)).

[53] We have given our careful thought to the submissions made on either side in the context of the evidence on record. The sale of the cannabis - the subject matter of the charge, was complete even though the price has not been
E paid (*Public Prosecutor v Sa'ari Jusoh* [2007] 2 MLJ 409; [2007] 2 CLJ 197 (FC)). It is safe to affirm the decision of the High Court. Accordingly, we dismissed the appeal of the appellant. We affirmed the conviction and sentence.

F *Appeal dismissed and conviction and sentence affirmed.*

Reported by Ibnu Aswan

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